

Mass Torts Talk

1. Introduction: how wrongful injury/death claims are adjudicated in the United States

There are two key aspects of the American legal system that greatly influence how wrongful injury/death claims are handled in the United States. First, there is a distinction between state and federal courts; second, there is a distinction between the roles of judge and jury.

Each of the 50 states has its own court system, its own procedural rules, and its own substantive law governing most lawsuits, including wrongful injury/death claims. In addition, there is a single federal court system, with local trial courts located in each state. These federal trial courts follow a unified set of federal procedural rules, but they apply substantive state law in all cases involving state law claims, including wrongful injury/death cases. State law cases can always be tried in state court. They can only be tried in federal court if the defendant is a citizen of a different state than the plaintiff, and the amount in controversy exceeds \$75,000 (as is often the case when a wrongful injury/death claim is brought against a corporate defendant).

American lawyers spend a lot of time deciding whether they would rather try their cases in state or federal court. As a general rule, plaintiffs' lawyers prefer state courts: of the 100 largest verdicts from across the United States in 2004, 81 came from state courts and 19 from federal courts. Defense lawyers usually prefer the federal system, which many believe is better organized, follows more rational and standardized procedures, and generally has very high quality judges. Therefore, most wrongful injury/death claims are brought by plaintiffs in state court, but are "removed" to federal court by defendants on diversity grounds.

Either party in a wrongful injury/death case can demand a jury trial, whether in federal or state court. The judge's role in a jury trial is to act as a neutral referee and instruct the jury on the law applicable to the case, while the jury's role is to make factual determinations, render a verdict, and determine damages if the plaintiff prevails; in non-jury trials, the judge also performs the jury's role. Traditionally, a jury comprised twelve jurors, and a unanimous verdict was required. Most states now permit juries of six in civil trials, and some states allow a less than unanimous verdict (five of the six jurors, for example).

Because plaintiffs' lawyers want it that way, virtually every wrongful injury/death trial is by jury, to take full advantage of the possibility that sympathetic jurors will return a large verdict

for the plaintiff. An entire industry of “jury consultants” has emerged to advise plaintiffs’ and defense lawyers concerning the type of potential juror who is most likely to favor their client (based upon age, sex, race, profession, economic status, etc.), and to conduct elaborate mock trials to determine which sorts of claims and defenses are most likely to persuade a jury. But despite this careful planning, juries remain unpredictable: for example, in similar cases brought by smokers against the tobacco industry, some juries have returned billion dollar verdicts, while others have found no liability.

Once trial is complete and a verdict has been rendered, the appeals process begins. Each party is entitled to at least one appeal, although the appeal is limited to questions of law: the appellate court may reverse, for example, because the judge incorrectly instructed the jury on the applicable legal standard, the judge permitted the jury to consider inadmissible evidence, or there was no evidentiary basis for the verdict.

2. Mass tort claims

The highest-profile civil actions in the American legal system are mass torts. A mass tort may be defined simply as a civil wrong that injures many people. It gives rise to a civil action involving numerous plaintiffs suing one or more corporate defendants for injuries allegedly resulting from an accident or from exposure to some product or substance. Most mass torts fall into one of three categories: i) mass disaster torts, such as airplane crashes; ii) mass toxic torts, such as seepage of solvents or other industrial waste into groundwater; iii) defective products litigation, such as the tobacco litigation.

Mass tort litigation involving particular products or industries usually evolves over time. For example, the first lawsuit claiming injuries from asbestos was filed in 1966, and resulted in a jury verdict in favor of the defendants. Three years later, a second asbestos suit was filed, this time resulting in a verdict for the plaintiff. Asbestos litigation spread throughout the United States in several waves during the 1970s and 1980s. First, there were claims by workers at asbestos mines and factories against the major asbestos manufacturers. Next, there were claims by workers who were allegedly injured by exposure at job sites where asbestos-containing products were installed, such as shipyards, refineries, railroads, and power plants; again, these lawsuits were chiefly against asbestos manufacturers, and by the mid-1980s the entire asbestos manufacturing industry was in bankruptcy, as were several major insulation manufacturers.

Finally, there were claims by workers in the construction industry who were exposed to various products such as fireproofing sprays, drywall, and other asbestos-containing construction materials; these lawsuits were brought against new defendants, including contractors, distributors, and industrial property owners. For example, in 1985 the first verdicts were rendered against a railroad company and against a brake lining manufacturer.

By the 1990s, asbestos litigation had become so great a burden on the American court system, on defendants in countless industries, and on insurance companies, that comprehensive Congressional legislation was regularly proposed (but never enacted) to handle all asbestos claims in an orderly, centralized fashion. The current political climate in the United States is probably more favorable to asbestos litigation reform than ever before. Legislation currently pending in the Senate Judiciary Committee would create a \$140 billion trust fund from contributions by manufacturers and insurers, to be administered by the federal government. Workers exposed to asbestos would be paid based on the severity of their injuries, without filing lawsuits, but could only collect on proof of existing harm (not for potential future injuries, as under current law). If the \$140 billion is insufficient to cover present and future claims, plaintiffs will regain their right to sue in court. Neither business nor labor is completely happy with this approach. Labor wants significantly more than \$140 billion in the trust fund, while business wants a guaranteed 7 ½ year moratorium on asbestos lawsuits, even if the \$140 billion is expended. The chairman of the Senate Judiciary Committee stated on March 1 that if business and labor are unable reach a compromise agreement on this bill in March, asbestos litigation reform is likely to be “relegated to the deep freeze.”

An important distinction must be drawn between mass torts and class actions, which are similar but often wrongly assumed to be the same thing. A class action is a lawsuit in which a single person or a small group of people is approved by the court to represent the interests of a larger group. Many mass tort cases are certified as class actions, but class actions are not limited to mass torts – they may also be certified in the context of civil rights, constitutional law, securities litigation, or any other area in which the following four criteria are met: i) the class of potential plaintiffs must be so large that individual suits would be impracticable; ii) legal or factual questions common to the class must predominate; iii) the claims or defenses of the representative parties must be typical of the class; and iv) the representative parties must be able to adequately protect the interests of the class.

Because any settlement or damage award in a class action must be shared among all members of the class, individual plaintiffs may recover less money in a class action than in an ordinary civil action; however, the large number of plaintiffs (and resulting large settlement or damages figure) in a class action often results in an enormous fee for the class attorneys. For example, the lawyers in a lawsuit against the manufacturer of allegedly faulty television sets received \$22 million in legal fees in a settlement, while class members received \$25-\$50 rebates on future purchases of television sets; the lawyers in a class action settlement with the manufacturer of Cheerios breakfast cereal received \$1.75 million in fees, and the company put coupons for a free box of cereal in the newspaper; and in the General Motors Corp. pick-up truck fuel tank litigation (which involved trucks that were allegedly vulnerable to fuel fires in side collisions), the class attorneys negotiated a settlement in which they received \$9.5 million in fees, while each class member received a \$1,000 coupon toward purchase of a new General Motors truck. (An appellate court rejected the General Motors settlement on the ground that the class representatives did not adequately protect the interests of the class.) As we will see later in the presentation, settlements of this type should be eliminated or severely restricted by the “Class Action Fairness Act” of 2005.

3. Case study: fast food/obesity claims

The last time I spoke to this group, I poked fun at claims that had recently been filed by plaintiffs who claimed that McDonald’s fast food had made them obese. At the time, it seemed that such claims had little or no chance of success, and indeed the early court rulings were uniformly unfavorable for the plaintiffs. However, a recent appellate court decision has revived at least some of these claims, and although long-term success still seems unlikely, I will use the fast food/obesity lawsuits as a case study in mass tort litigation.

The claims in the leading fast food/obesity case were brought as a class action by two teenagers who ate McDonald’s food three to five times a week for fifteen years. The plaintiffs filed their lawsuit in state court in New York, and McDonald’s removed the case to federal court. The original complaint – which alleged that McDonald’s had deceived its customers and sold “addictive” food – was dismissed for failure to allege specific wrongful acts committed by McDonald’s, and because the claim that its food was addictive was overly vague and unsupported by any factual allegations. However, the plaintiffs were permitted to file an

amended complaint, which they promptly did. The claims in the amended complaint were: i) the effect of certain McDonald's promotions and advertisements was to create a false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily; ii) McDonald's failed adequately to disclose that its use of certain additives and the manner of its food processing rendered its food less healthy than represented; iii) McDonald's deceptively represented that it would provide nutritional information to customers, when in fact such information was not readily available in McDonald's restaurants; iv) as a result of these deceptive practices, the plaintiffs were misled into believing that McDonald's food was nutritious; and v) as a result of their consumption of McDonald's food, the plaintiffs developed obesity, diabetes, heart disease, high blood pressure, high cholesterol, related cancers, and other detrimental health effects.

These revised claims were also initially unsuccessful. McDonald's filed a motion to dismiss, arguing that the plaintiffs had failed to state a claim upon which relief could be granted under New York law. Two New York statutes were at issue, one prohibiting false advertising, and the other prohibiting deceptive business practices. The federal trial court judge dismissed the lawsuit, holding that McDonald's advertisements – particularly its representations that its French fries were “made with 100% vegetable oil and/or are cholesterol-free” – were “objectively non-deceptive,” because the full text of the advertisement cited in the plaintiffs' complaint revealed the level of cholesterol in McDonald's French fries. Therefore the plaintiffs could not state a false advertising claim. The judge also held that the plaintiffs had failed to state a claim for deceptive business practices, because they did not “draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries,” and did not address other potential causes of their health problems, such as lack of exercise and family medical history.

On January 25, 2005 a federal appeals court vacated the trial court's dismissal of the action. The appellate court held that it was not necessary for the plaintiffs to allege (as opposed to prove at trial) a specific causal connection between their health problems and consumption of McDonald's food in order to bring a claim for deceptive business practices. Under federal procedural rules, the plaintiffs needed only to allege “a short and plain statement of the claim showing that the pleader is entitled to relief,” not to allege a particular causal connection between McDonald's food and their alleged injuries. Nor were the plaintiffs required to address other

potential causes of their health problems: this is “the sort of information that is appropriately the subject of discovery, rather than what is required to satisfy . . . pleading requirements.”

This holding creates a roadmap for likely future fast food/obesity litigation. Plaintiffs’ attorneys will focus on state consumer protection statutes like New York’s law prohibiting deceptive business practices. New lawsuits against the fast food industry will target allegedly unfair and deceptive advertisements, promotions, and product descriptions, especially where terms such as “low fat” and “high fiber” are unaccompanied by accurate nutritional information. Some plaintiffs’ lawyers may also attack manufacturers’ efforts to establish brand loyalty among children. Consumer protection lawsuits may provide plaintiffs’ lawyers several advantages over traditional personal injury actions: i) consumer protection statutes allow plaintiffs to recover purely economic damages, such as refund of the purchase price, which may be easier to prove than establishing a causal connection to obesity or other personal injury; ii) consumer protection statutes do not require proof of reliance upon deceptive statements, simply receipt of such statements; iii) since individual reliance on deceptive statements is not necessary, plaintiffs are more likely to meet the “commonality” and “typicality” requirements and succeed in having class actions certified.

Now that fast food/obesity claims have survived the initial challenge to their legal sufficiency, they can be expected to pass through certain distinct stages as they make their way through the American legal system. First, all of the cases that are successfully removed to federal court (probably the vast majority) will be transferred to a single federal trial court for coordinated pretrial proceedings, called “multidistrict litigation” (MDL). A single court will make common pretrial rulings, oversee discovery, and decide certain evidentiary issues before transferring the cases back to their local district courts for trial. Second, there will be a probing period, when legal issues are sharpened by rulings on summary judgment motions (determining whether a party is entitled to judgment as a matter of law on the undisputed facts of the case), a few early cases go to trial, and consumers and the financial world react to the claims. Then, after the parties have absorbed these court rulings, jury verdicts, and publicity effects, there will likely be a resolution: either the defendants will begin settling the vast majority of the cases (like pharmaceutical manufacturer Wyeth, which recently approved a settlement offer relating to its fen-phen diet drug compound, paying anywhere from \$5,000 to \$200,000 to thousands of plaintiffs with heart-valve injuries, and an additional \$100,000 for plaintiffs who undergo heart

surgery before a certain date) or plaintiffs' lawyers will lose interest and move on to more lucrative claims (as in the litigation by victims of gun violence against gun manufacturers and sellers, which has yielded no significant victories for plaintiffs, although a few cases have escaped dismissal and are pending around the country).

Another noteworthy topic in our fast food/obesity case study is the likelihood that fast food defendants will engage in extensive cooperation with each other, if they have not already begun doing so. Obesity lawsuits have named not only McDonald's, but also Burger King, Kentucky Fried Chicken, Wendy's, and other companies as defendants. The claims against these companies involve similar products, similar conduct by defendants, and similar allegations of harm caused by such products and conduct. Fast food defendants will enter cooperation agreements as a matter of sheer efficiency to share workload and expenses, present a united front to the media and to plaintiffs' lawyers, and engage in coordinated expert discovery and trial preparation. The cost of these cooperative efforts will be divided among the parties, most likely on the basis of each party's share of the fast food market.

Despite the usefulness of market share as a tool for dividing defense cooperation costs, market share is usually not a basis for liability when a plaintiff wishes to sue an entire industry. The theory of "market share liability" is that a plaintiff can hold a product manufacturer liable for damages in proportion to its share of the total market for the product when the plaintiff's injury is caused by a fungible (interchangeable) product, and plaintiff cannot identify the manufacturer. This theory was first applied in California, in a case involving injuries caused by the drug DES, a generic drug the plaintiff's mother took to help prevent miscarriage, that could not be traced back to its manufacturer when the plaintiff manifested an injury many years later. However, this theory has not been widely adopted: i) only a few courts outside California and New York have recognized the theory; ii) it has been applied almost exclusively to DES cases; and iii) even where courts allow the theory, it merely shifts the burden to defendants to prove that they had no product on the market at the time of the injury, or that they could not have produced the specific drug dosage that injured the particular plaintiff.

4. Recent developments in mass torts

On the whole, recent developments in mass torts have been favorable to defendants, perhaps as a reaction to some of the excesses of the past few decades. I want to mention four

examples: i) the Class Action Fairness Act of 2005 (CAFA); ii) constitutional limits on punitive damages; iii) declining jury verdicts; and iv) pro-defendant decisions in traditionally pro-plaintiff state courts.

The Class Action Fairness Act (CAFA) was signed by President Bush on February 18, 2005. CAFA has two basic parts: i) a new set of provisions guaranteeing that most large class actions must be brought in federal court, and that such actions brought in state court can easily be removed to federal court; ii) a “consumer bill of rights” that creates new rules for class action settlements.

The first set of provisions is designed to eliminate the proliferation of class actions in certain “magnet” state courts (such as the notorious Madison County, Illinois), by creating federal jurisdiction over class actions in which the amount in controversy exceeds \$5 million, there are at least 100 class members, and any member of the class is a citizen of a different state than any defendant. (The previous rules held that if any named plaintiff and any named defendant were from the same state, the action could not be filed in or removed to federal court, and the claims of class members could not be aggregated to reach the \$75,000 federal threshold.) There are limits to this newly created federal jurisdiction, however. CAFA leaves in state court: i) class actions in which all plaintiffs and defendants are residents of the same state; ii) class actions with fewer than 100 plaintiffs; iii) class actions involving less than \$5 million; iv) class actions in which a state government entity is the primary defendant; v) class actions brought against a company in its home state, in which 2/3 or more of the class members are also residents of that state; or vi) class actions involving injuries suffered in the forum state, as long as at least 2/3 of the class members and one real defendant are residents of the state where the suit is brought, and no other class actions have been brought regarding the same controversy.

CAFA’s so-called “consumer bill of rights” is somewhat simpler. It: i) requires judges to review all coupon settlements and limit attorney’s fees to the value actually received by class members (i.e., the value of coupons actually redeemed); ii) requires scrutiny of “net loss” settlements in which class members end up losing money because their contributions toward legal fees exceed their payout; iii) bans settlements that award some class members a larger recovery because they live closer to the court; iv) allows federal courts to maximize the benefit of class action settlements by requiring that unclaimed coupons or settlement funds be donated to

charity; and v) requires notice of proposed settlements to be provided to appropriate federal and state officials (such as attorneys general).

Although the U.S. Supreme Court decided several years ago (in 1996) that excessive punitive damages awards could be unconstitutional, there was little practical guidance regarding how courts should apply this rule, and what “excessive” meant. In 2003, in a case involving an insurance company’s bad faith refusal to settle a claim against an insured, the Supreme Court threw out a \$145 million punitive damages award in a case with \$1 million in compensatory damages, and held that: i) few awards exceeding a single-digit ratio between punitive and compensatory damages are proper (i.e., 9:1 is the practical limit in most situations); and ii) it is improper to levy punitive damages against a defendant for its generally wrongful conduct – only wrongful conduct toward the actual plaintiff in a particular case is appropriate. Although this was not a mass torts decision, subsequent federal case law has made clear that these guidelines apply with equal force in mass torts cases. For example, a federal appellate court in Arkansas held on January 7, 2005 that a jury’s award of \$15 million in punitive damages atop a \$4 million compensatory damages award in a smoker’s wrongful death action against a tobacco company was excessive, and ordered a reduction of the punitive damages award to \$5 million. The court concluded that the defendant’s conduct was highly reprehensible and punitive damages were appropriate, but held that when actual damages are high (as in this case), punitive damages should be reduced accordingly. Even a 4:1 ratio may be excessive and unconstitutional when the plaintiff receives a multi-million dollar compensatory damages award.

The last time I spoke to this group, a jury had recently rendered a \$28 billion tobacco verdict, and there seemed to be no limit on how high jury verdicts would go. Things have calmed down somewhat since then. In the 100 largest verdicts of 2004, juries awarded a total of \$11.1 billion in damages, down from \$20.1 billion in 2003 and \$40 billion in 2002. (These figures are adjusted for inflation.) No one is quite sure why large jury verdicts have been declining. Some analysts believe there is a growing popular sentiment that huge verdicts have gotten out of control; others believe that American cynicism toward corporate management, which crested in the wake of Enron and other scandals in 2002, has begun to recede; and still others suspect that jurors have realized that excessive punitive awards will be thrown out by judges, and this has had a moderating effect on verdicts. Another significant change is in the type of cases yielding the largest awards: most of the largest verdicts of 2004 involved

allegations of negligence or deliberate wrongdoing brought by single plaintiffs in unique circumstances, not mass torts. There were 17 product liability cases (mostly brought by single plaintiffs against auto manufacturers, but also involving products such as tobacco, fen-phen and other pharmaceuticals, and artificial butter flavoring in popcorn, which allegedly caused lung disease in a plant worker) and 14 motor vehicle accident cases. The two largest verdicts were in insurance fraud and antitrust cases, neither mass torts. These results do not necessarily suggest that large mass torts verdicts are experiencing a long-term decline, but there seems to be at least a short-term stabilizing effect.

Finally, there has been some indication in recent years that courts – at least state supreme courts, if not trial courts – in traditionally pro-plaintiff states have begun to even the playing field. The Mississippi Supreme Court in 2004 threw out a \$100 million jury verdict against Johnson & Johnson, the manufacturer of Propulsid, a prescription medication used to treat gastroesophageal reflux disease. The ten plaintiffs ranged in age from three to seventy-nine; complained of a variety of different types of injury; and alleged medical expenses ranging from zero to \$100,000. After a four-week trial, the jury took only two hours to award each plaintiff exactly \$10 million, for a total of \$100 million. The state supreme court threw out the award, finding improper joinder of plaintiffs and holding: “The plaintiffs were prescribed Propulsid . . . in different amounts for different ailments . . . at different times, thus falling under different labels and different warnings. The plaintiffs also presented ten unique medical histories.” Under these conditions, the defendant was unfairly prejudiced by the joinder of ten plaintiffs with dissimilar claims.

Also, the Texas Supreme Court in 2004 set aside a trial court judgment awarding an auto driver \$900,000 in compensatory damages and \$1.2 million in punitive damages in an unintentional acceleration case. The basis for the reversal was the trial judge’s error in allowing the jury to consider hearsay evidence from the auto manufacturer’s database of 757 consumer complaints of unintended acceleration. The Texas Supreme Court held: “While it was up to the jury in this case to decide what caused [the plaintiff’s] accident, she had to present evidence that her car was defective. . . . [P]roduct defects must be proved; they cannot simply be inferred from a large number of complaints.” Texas plaintiffs will still be allowed to conduct discovery concerning previous similar complaints, but previous similar incidents will now have to be

proved (as in many other states) through the trial testimony of other drivers, not through out-of-court database statements not subject to cross-examination.

5. Anticipated developments

In an area as volatile and rapidly changing as mass torts, it is difficult to make too many predictions. However, it is clear that President Bush and the Congressional Republicans would like to institute more extensive tort reform than CAFA, which they view as only a first step. CAFA passed easily because it commanded strong bipartisan support, but in light of Republican control of the White House and Congress, we can reasonably expect to see additional reform in the following areas, although there will be fierce battles on all of these: i) a uniform, national punitive damages cap (many states have already enacted such caps) of a specific amount – \$250,000 is the number mentioned most often – or double compensatory damages, whichever is greater; ii) a uniform, national cap on non-economic damages in medical malpractice actions – again, \$250,000 is a frequently cited number; iii) asbestos litigation reform, as described above. In addition, the following areas may see reform, although they have not received as much publicity: iv) extension of the preemption doctrine, which protects defendants who have complied with federal safety standards from product liability claims; v) replacement of joint and several liability (the “deep pocket” rule) with proportionate liability, requiring each defendant to pay only its proportionate share of the plaintiff’s loss; vi) elimination of the “collateral source rule,” which prohibits defendants from introducing evidence that plaintiffs received benefits from third parties (usually insurance companies), thereby allowing double recovery for the same injury (some states have already enacted reforms in this area).

There has never been a time when it appeared more likely that tort reform legislation would significantly alter the American legal landscape. If all (or even some) of this potential legislation passes, I will have many more new developments to report if I have the pleasure of speaking to you again about the changing face of American mass torts litigation.

WIGGIN AND DANA

Counsellors at Law

**Mass Torts Litigation in the
United States**

4 April 2005

Jeremy G.
Zimmermann

Wiggin and Dana LLP

WIGGIN AND DANA

Counsellors at Law

Mass Torts Litigation in the United States

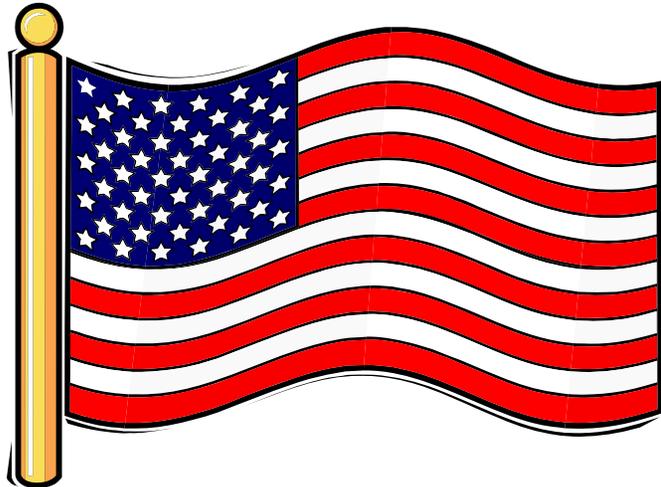


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Introduction

How Wrongful Injury/Death Claims
are Adjudicated in the United States



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State Court

- Each state has its own court system
- Each state has its own procedural rules
- Each state has its own substantive law
- 81 of 100 largest verdicts in 2004
- Elected judges

Federal Court

- One federal system with local trial courts
- One federal code of procedural rules
- Federal courts apply state substantive law
- Federal trial if diverse citizenship and \$75,000+
- Appointed judges (for life)

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Judge

- Neutral referee
- Instruct jury on applicable law
- Determine facts and award damages only in non-jury trial

Jury

- Determine facts
- Apply law to facts
- Render verdict
- Determine damages if plaintiff prevails



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Appeals

- At least one appeal as of right
- Appeal limited to questions of law
- Examples:
 - Judge incorrectly instructed jury
 - Jury considered inadmissible evidence
 - No evidentiary basis for verdict

Mass Tort Claims



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Mass Torts

Mass tort: a civil wrong that injures many people and gives rise to a lawsuit involving numerous plaintiffs suing one or more corporate defendants for injuries allegedly resulting from an accident or from exposure to some product or substance.

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Mass Torts

Mass Disaster Torts:
Airplane crashes

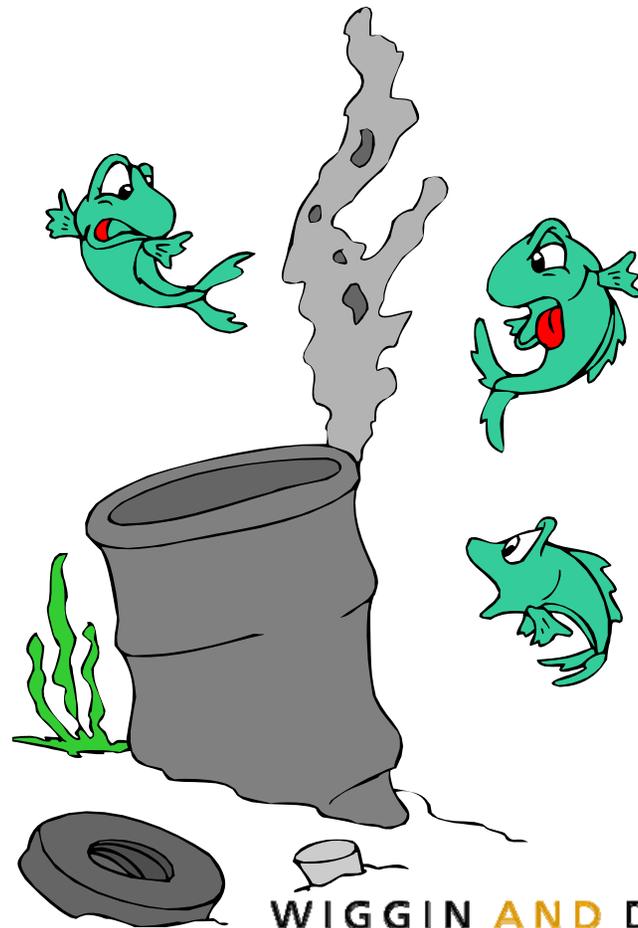


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Mass Torts

Mass Toxic Torts:
Seepage of
industrial waste



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Mass Torts

Defective Products Litigation: Tobacco



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Asbestos Litigation

- Early Claims (late 1960s)
- Wave I (1970s): Mine & Factory Workers v. Manufacturers
- Wave II (70s-80s): Installers of Asbestos v. Manufacturers
- Wave III (80s-present): Construction Workers v. Contractors, Distributors, Property Owners



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Class Actions

- Class Action: lawsuit in which a single person or small group of people is certified to represent interests of larger group.
- Class of potential plaintiffs so large that individual suits would be impractical
- Legal or factual questions common to the class predominate (“commonality”)
- Claims of representatives parties must be typical of the class (“typicality”)
- Representative parties must be able to adequately protect interests of the class



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Class Actions Settlements

- Relatively small recovery for individual class members, but large attorney's fees
- Thomson Electronics television sets: \$22 million for lawyers, \$25-\$50 rebate for customers
- Cheerios: \$1.75 million for lawyers, coupon for free box of cereal in newspaper
- General Motors trucks: \$ 9.5 million for lawyers, \$1,000 coupon toward new truck
- “Class Action Fairness Act” of 2005



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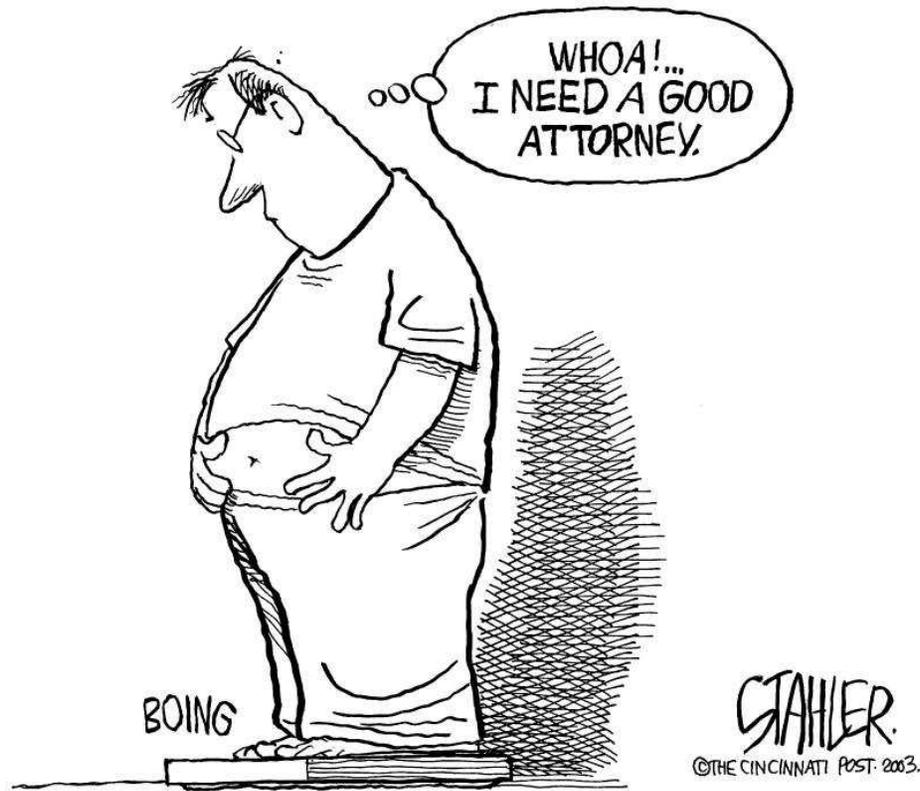
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Case Study:
Fast Food /Obesity Claims



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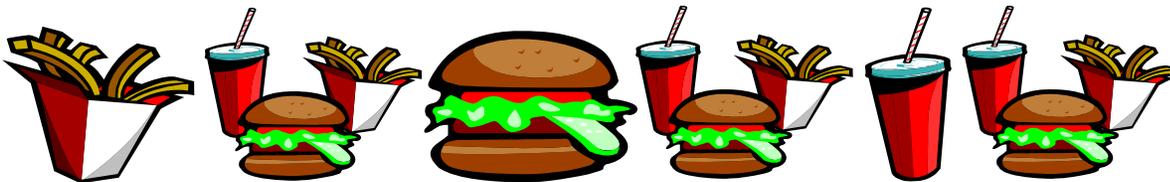


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Fast Food/Obesity Claims

- False impression that food was nutritious/healthy
- Failed to disclose that use of additives and manner of food processing made food unhealthy
- Deceptively represented that it would provide nutritional information to customers
- Plaintiffs misled to believe that food was nutritious/healthy
- Plaintiffs suffered obesity, diabetes, heart disease, high blood pressure, high cholesterol, cancer



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Fast Food/Obesity Claims Initially Unsuccessful

- No false advertising: McDonald's advertisements objectively non-deceptive because advertisement cited in complaint revealed cholesterol level
- No deceptive business practices: plaintiffs failed to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries, and failed to address other potential causes of injury

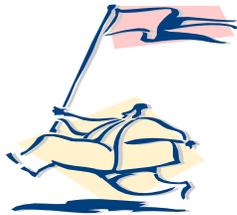


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On Appeal Deceptive Business Practices Claim Reinstated

- Federal rules require only “a short and plain statement”
- Not necessary to allege a causal connection between health problems and consumption of McDonald’s food to bring a claim for deceptive business practices
- Not necessary to address other potential causes of health problems such as lack of exercise and family medical history: such issues are reserved for discovery
- Misleading advertisements may constitute deceptive business practices



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Roadmap For Future Fast Food/ Obesity Claims

- Focus on state consumer protection statutes
- Target allegedly unfair & deceptive advertisements, promotions and product descriptions
- Easier to prove purely economic damages such as purchase price, rather than personal injury
- No requirement that plaintiff relied upon deceptive statements
- Easier to certify class actions with no need for individualized proof of reliance on advertisements



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Phases in Mass Tort Litigation

- Multidistrict Litigation (MDL): coordinated pretrial proceedings, and transfer back to local federal district court for trial
- “Probing” phase: legal issues sharpened by rulings on motions; some cases go to trial; consumers and financial world respond to litigation
- Resolution phase: depending on outcome of probing period, defendants begin settling cases or plaintiffs’ lawyers lose interest and pursue more lucrative claims

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Defense Cooperation

- Multiple defendants with similar products, similar alleged conduct, and similar harms alleged by plaintiff
- Cooperation (“joint defense”) agreement: share workload and expenses, present a united front, engage in coordinated expert discovery and trial preparation
- Cost-sharing on market share basis



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Market Share Liability

- Market share liability: plaintiff can hold manufacturer liable for damages in proportion to its share of the total market when product is interchangeable and plaintiff cannot identify manufacturer
- Most cases are California and New York
- Theory has been applied almost exclusively in DES cases
- Burden-shifting: defendants may prove that they had no product on the market or could not have produced specific dosage

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Recent Developments in Mass Torts

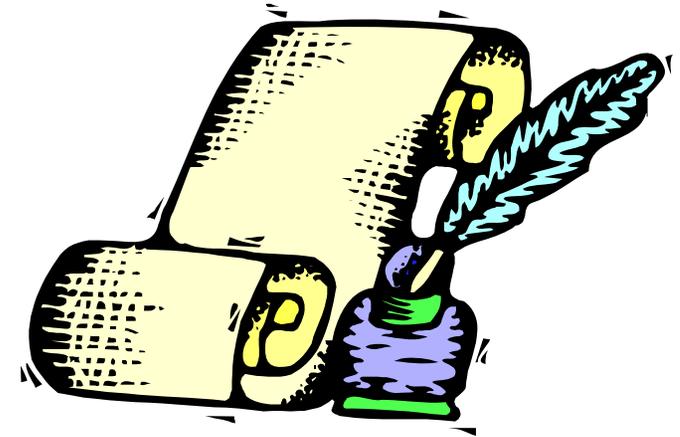


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Recent Developments in Mass Torts

- Class Action Fairness Act of 2005 (CAFA)
- Constitutional limits on punitive damages
- Declining jury verdicts
- Fair decisions in traditionally pro-plaintiff state supreme courts



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CAFA Jurisdictional Provisions

- Federal jurisdiction over \$5 million, at least 100 class members, and any member of the class is a citizen of a different state than any defendant

CAFA Consumer Bill of Rights

- i) Attorney's fees limited to value of coupons actually redeemed
- ii) Judicial scrutiny of "net loss" settlements
- iii) No settlements awarding larger recovery to local class members
- iv) Unclaimed coupons and settlement funds go to charity
- v) Notification of proposed class action settlements to appropriate federal and state officials

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Constitutional Limits on Punitive Damages

- Ratio between punitive & compensatory damages should rarely exceed 9:1
- Defendant should be punished only for wrongful conduct toward actual plaintiff, not for its generally wrongful conduct
- High compensatory damages reduce punitive damages ratio

Declining Jury Verdicts

- 100 largest verdicts of 2002 = \$40 billion
- 100 largest verdicts of 2003 = \$20.1 billion
- 100 largest verdicts of 2004 = \$11.1 billion
- Among 100 largest verdicts of 2004, 17 were products liability cases and 14 motor vehicle cases
- Two largest verdicts of 2004 were in insurance fraud and antitrust cases



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Fair Decisions in Supreme Courts of Traditionally Pro-Plaintiff States

- Mississippi Supreme Court: threw out \$100 million verdict due to improper joinder of ten defendants with dissimilar claims and unique medical histories
- Texas Supreme Court: set aside \$2.1 million verdict due to improper admission of hearsay evidence from auto manufacturer's database of previous consumer complaints

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Anticipated Developments



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Anticipated Developments

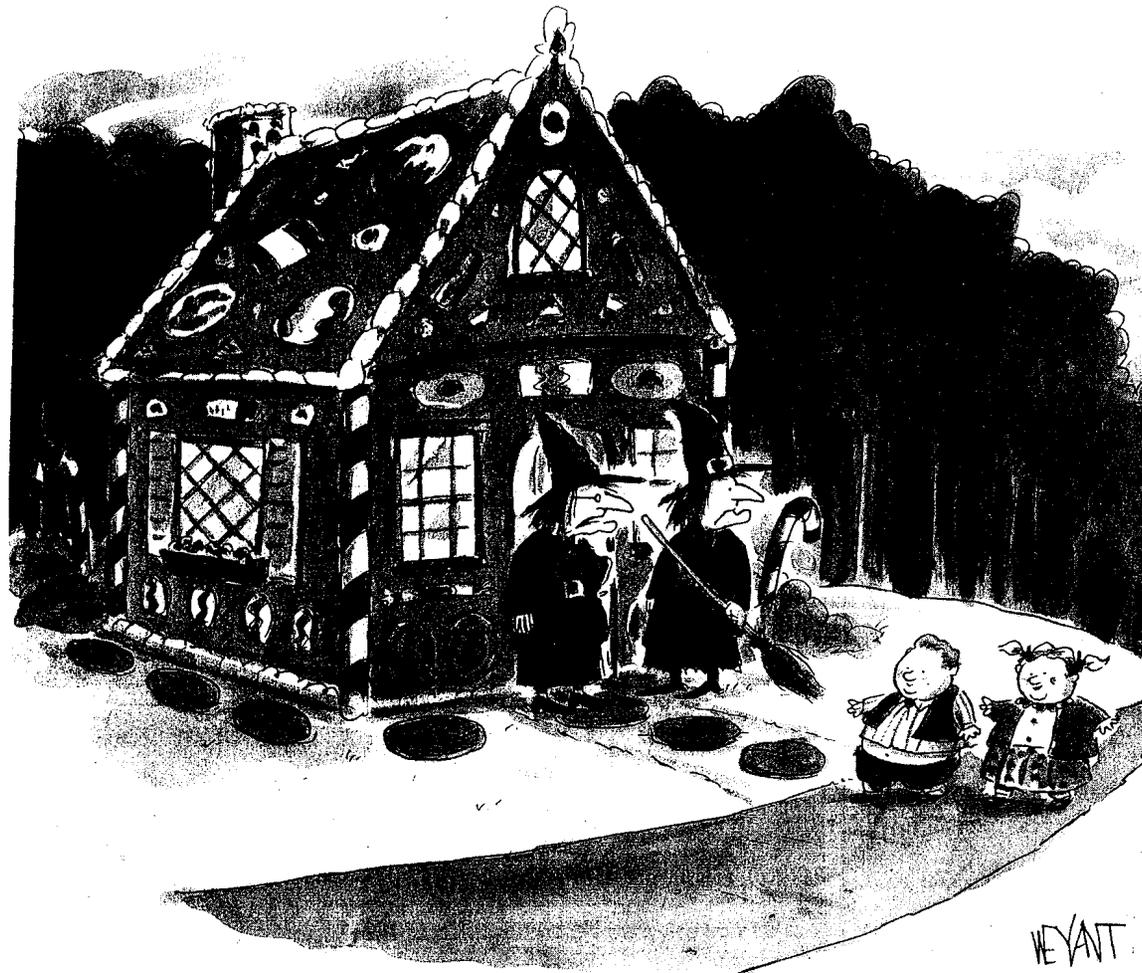
- Uniform, national punitive damages cap of \$250,000 or double compensatory damages, whichever is greater
- Uniform, national cap of \$250,000 on non-economic damages (“pain and suffering”) in medical malpractice actions
- Asbestos litigation reform (\$140 billion trust fund)

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Anticipated Developments

- Extension of the preemption doctrine
- Replacement of joint and several liability with proportionate liability
- Additional state tort reform



"Remember when we used to have to fatten the kids up first?"

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